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In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

WRIGHTWOOD DAIRY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and order involved	2
Statement	3
Specification of errors to be urged	4
Reasons for granting the writ	5
Conclusion	8

CITATIONS

Cases:

Bunte Bros. v. *Federal Trade Commission*, 110 F. (2d) 412, affirmed *sub nom. Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 — 7

Carter v. *Carter Coal Co.*, 298 U. S. 238 — 8

Chicago Board of Trade v. *Olsen*, 262 U. S. 1 — 7

Currin v. *Wallace*, 306 U. S. 1 — 7

Holbrook v. *Wallace*, Civil Action No. 5811 (D. D. C.), decided March 19, 1940 — 6

Labor Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 — 6, 7

Mulford v. *Smith*, 307 U. S. 38 — 7

Railroad Commission of Wisconsin v. *Chicago B. & Q. R. Co.*, 257 U. S. 563 — 7

Schechter Corp. v. *United States*, 295 U. S. 495 — 7

Shreveport Case, 234 U. S. 342 — 7

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381 — 8

United States v. *Adler's Creamery Inc.*, 107 F. (2d) 987, 110 F. (2d) 482, certiorari denied, 311 U. S. 657 — 6

United States v. *Andrews*, 26 F. Supp. 123 — 6

United States v. *Darby*, 312 U. S. 100 — 7

United States v. *H. P. Hood & Sons*, 26 F. Supp. 672 — 6

United States v. *Krechting*, 26 F. Supp. 266 — 6

United States v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533 — 2, 5

United States v. *Schwarz et al.*, Civil Action No. 1480 (N. D. Ill.), decided January 30, 1941 — 6

Statute:

Act of May 12, 1933 (48 Stat. 31), as amended May 9, 1934 (48 Stat. 670), as further amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937 approved June 3, 1937 (50 Stat. 246), Sec. 8c (7 U. S. C., Supp. V, Sec. 608c) — 2

Miscellaneous:

Federal Rules of Civil Procedure Rule 56 (d) — 3

4 Fed. Reg. 1259 — 8

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PETITION

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled cause on October 27, 1941.

OPINIONS BELOW

No opinion was rendered by the United States District Court for the Northern District of Illinois, Eastern Division. The District Court's findings of fact and conclusions of law appear in the record (R. 245–247). The opinion of the Circuit Court of Appeals (R. 220) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 27, 1941 (R. 220). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether federal regulation of the price of intrastate milk sold in competition with interstate milk is permissible under the commerce clause of the Constitution and the Agricultural Marketing Agreement Act of 1937.[1]

STATUTE AND ORDER INVOLVED

The statute involved is Sec. 8c of the Act of May 12, 1933 (48 Stat. 31), as amended May 9, 1934 (48 Stat. 670), as further amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937 approved June 3, 1937 (50 Stat. 246). See 7 U. S. C., Supp. V, Sec. 608c.[2] Sec. 8c permits the Secretary of Agriculture to issue marketing orders fixing minimum prices for milk and other commodities. Paragraph (1) of that section provides that orders issued by the Secretary—

> shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

Pursuant to the provisions of the Act, the Secretary of Agriculture on August 28, 1939, promulgated Order No. 41 regulating the handling of milk in the Chicago area. The Order (printed in the record at R. 8–22) is of the same type as is described in this Court's opinion in the *Rock Royal* case, 307 U. S., at 551–555. It contains provisions for the fixing of minimum prices for milk sold by producers to handlers and for

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[1] There may be other subsidiary or related questions, set forth in the Specification of Errors, *infra*, pp. 4–5, which in the interest of brevity are not spelled out here. If certiorari is granted, petitioner will also urge that the district court had no jurisdiction to enjoin the United States and its officials from enforcing the milk order against respondent.

[2] The statutory provision is the same as that which was before the Court in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533.

a producer-settlement fund to equalize the payments to producers. The Order was issued after a hearing and findings by the Secretary of Agriculture.[3]

STATEMENT

On December 26, 1939, the United States, petitioner herein, filed its complaint in which it sought to compel respondent to comply with Order No. 41 (R. 2–7). Among the numerous defenses set up in respondent's answer (R. 84–101) was the contention that respondent's business was entirely intrastate, and that accordingly the statute was not, and could not constitutionally be, applicable (R. 87–89). The answer also contained a counter-claim praying that the government officials should be enjoined from enforcing Order No. 41 against respondent (R. 99–100).

Petitioner moved for summary judgment on affidavits (R. 105–116). The trial court denied the motion, but found certain facts to exist without controversy (R. 157), and under Rule 56 (d) of the Federal Rules of Civil Procedure the facts so specified are to be deemed established for purposes of the case. The court found that respondent purchased milk from producers within the State of Illinois, processed the milk in Chicago, and sold it in Illinois "in competition with the milk of other handlers in the area" (R. 157–158). None of respondent's milk was physically intermingled with milk which had crossed state lines (R. 158). The court further found that prior to the issuance of Order No. 41, 60% of the milk sold in the Chicago marketing area was produced in Illinois and 40% in Wisconsin, Indiana and Michigan and that at the time of the findings "over 60%" was produced in Illinois (R. 158).

At the trial the transcript of proceedings before the Secretary was introduced in evidence by respondent (R. 201). The

[3] The record before the Secretary of Agriculture was introduced in evidence as Defendant's Exhibits 1–4. This record has not been reprinted, but has been certified to the Court in its original form.

transcript contained evidence showing that 40% of the milk consumed in Chicago came from outside the State of Illinois, and also testimony that producers who sold to handlers competing with cut-rate handlers must reduce their prices in order to permit handlers of their milk to compete successfully.[4] Upon the basis of such evidence, *inter alia*, the Secretary of Agriculture found as a fact (R. 10):

> That all milk which was produced for sale in the marketing area is handled in the current of interstate commerce, or so as directly to burden, obstruct, or affect interstate commerce in milk or its products; * * *

At the conclusion of the trial the District Court reaffirmed the findings previously made, and added a finding that the defendant's business was "not in the current of" and "did not directly burden, obstruct or affect interstate commerce" (R. 246). The court thereupon dismissed the complaint filed by petitioner and granted the respondent the injunctive relief prayed for in the counter-claim (R. 246–248). The Circuit Court of Appeals affirmed (R. 270).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that respondent was not a handler of milk, as defined in the Act and the Order, subject to the provisions of the Order.

(2) In holding that the business of distributing milk conducted by the respondent in competition with interstate commerce in milk does not directly burden, obstruct or affect such commerce.

(3) In determining the question presented in this case without giving effect to the Secretary's finding, supported by evidence in the record before him, that all milk produced for sale in the area directly affects interstate commerce.

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[4] See Def. Ex. 4 (Original); Transcript of Record before the Secretary of Agriculture, Ex. 2, pp. 10–12, 75–76.

(4) In failing to hold that petitioner's motion for summary judgment should have been granted.

(5) In affirming the decree of the District Court enjoining the United States and its officers from enforcing Milk Order No. 41 against respondent.

(6) In failing to order respondent to comply with said Order.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533. In its opinion in that case this Court stated (p. 568):

> Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the federal authority covers the sales of this milk, as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk which moves across state lines.

Respondent urged in the court below that none of the defendants in the *Rock Royal* case were engaged in intrastate business, and that accordingly the above statement was merely an "erroneous" or "gratuitous" dictum.[5] It is true that this Court also declared in its opinion in the *Rock Royal* case that (p. 568):

> There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce.

But the record in the case shows that, although the issue was not pressed in this Court, the respondent Central New York Cooperative Association, Inc., did challenge the power of Congress to regulate it on the ground that its activites were entirely intrastate.[6]

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[5] See respondent's brief in the Circuit Court of Appeals, pages 40, 35.

[6] The answer of the Central New York Cooperative Association, Inc., alleged that all of the milk handled by it was produced and sold in the state of New York and that none of it crossed state lines or was mixed

2. The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Adler's Creamery, Inc.*, 107 F. (2d) 987, 110 F. (2d) 482, certiorari denied, 311 U. S. 657. The *Adler* case involved the application of the New York Milk Order to a handler who obtained and distributed all of its milk within the State of New York. The court below refused to accept the *Adler* case as persuasive because of the Second Circuit's reliance on "the inapposite remarks made in the *Rock Royal* case" (R. 222). Neither respondent nor the court below has denied that the *Adler* case conflicts with the decision reached here.

3. The decision below conflicts with the unreversed decisions of five district judges on the same point. *United States* v. *Krechting*, 26 F. Supp. 266 (S. D. Ohio); *United States* v. *Andrews*, 26 F. Supp. 123 (D. Mass., Judge Brewster); *United States* v. *H. P. Hood & Sons*, 26 F. Supp. 672 (D. Mass., Judge Sweeney); *United States* v. *Schwarz et al.*, Civil Action No. 1480 (N. D. Ill.), decided January 30, 1941 (Judge Barnes); *Holbrook* v. *Wallace*, Civil Action No. 5811 (D. D. C.), decided March 19, 1940.

4. The decision below conflicts with the fundamental constitutional[7] doctrine that the power of Congress extends to the control of intrastate acts when necessary to the effective regula-

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with other milk which had crossed state lines (October Term 1938, No. 771, Transcript of Record, p. 80). The stipulation on which the case was tried substantiated these allegations, except that it showed that while the Association's milk usually followed a route to New York City entirely within the state of New York, prior to October 1, 1938, the tank trucks often passed through the state of New Jersey en route to New York City, and that when tank trucks were not available the milk was shipped by rail on railroads running through the state of New Jersey (*id.*, pp. 285–287).

[7] Since the statute and marketing order in this case apply in terms to activities which "directly affect interstate commerce" the question of the applicability of the statute is the same as the question of constitutional power. Cf. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30–31. The opinion of the court below demonstrates that the issue was treated as one of constitutional law.

tion or protection of interstate commerce.[8] A program for the establishment of minimum prices for interstate milk cannot be effective if intrastate milk can be sold competitively without restriction. This seems to have been conceded by the court below when it declared (R. 27[illegible]):

> Unfortunately, if the defendant is not subject to the regulations of Order No. 41, the result may well be that the effective sanction of the order will wither before the force of competition, the morale of the market will disintegrate, and this attempt at solution of the problem by the national government will fail.

The court below was of opinion that the fact that the unregulated intrastate transactions were in competition with similar interstate transactions was not sufficient to bring the former within the federal commerce power.[9] But in the *Shreveport Case* itself the federal regulation of intrastate railroad rates was upheld precisely because of competitive discrimination against interstate rates.[10] The ruling below is thus inconsistent not only with the familiar principle for which the *Shreveport Case* stands, but also with the decision on its facts. Also closely in point is the language in the dissenting opinion of

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[8] *Shreveport Case*, 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. Co.*, 257 U. S. 563; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Schechter Corp.* v. *United States*, 295 U. S. 495, 544–546; *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36–38; *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; *United States* v. *Darby*, 312 U. S. 100, 121.

[9] In *Bunte Bros.* v. *Federal Trade Commission*, 110 F. (2d) 412 (C. C. A. 7), affirmed *sub nom. Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, the court below and this Court held the Federal Trade Commission Act inapplicable to intrastate sales competing with interstate on the ground that that act applied only to transactions in interstate commerce and not to those "affecting" such commerce. Both opinions in the *Bunte* case seem to imply that the constitutional power of Congress unquestionably extends to the transactions in question. The statute involved in the present case contains the language omitted from the Federal Trade Commission Act.

[10] In *Schechter Corp.* v. *United States*, 295 U. S. 495, 546, this Court stated that "Direct effects are illustrated by the railroad cases we have cited, as *e. g.*, * * * the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce."

Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 329, with respect to the fixing of minimum prices for coal: [11]

> Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other. * * *

5. The question presented is one of great public importance and should be settled. At the present time federal orders regulating the handling of milk are in effect in twenty widely separated marketing areas. In every one of these areas there is a substantial number of handlers whose business is wholly intrastate in character. The inherent nature of the regulation embodied in each of these orders is such that unless uniformly applied to all handlers in the marketing area, the order cannot operate. Indeed, the New York Milk Order was suspended when the adverse decision below made it impossible to obtain uniform compliance. See 4 Fed. Reg. 1259; *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S., at 555.

CONCLUSION

It is respectfully submitted that, for the reasons stated, this petition for writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.

NOVEMBER, 1941.

[11] The majority of the Court in the *Carter* case did not pass on the price fixing provisions of the Coal Act. The views expressed in the opinion of Mr. Justice Cardozo were approved by this Court in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381.

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